

HUMAN SERVICES BOARD

INTRODUCTION

The petitioner filed her appeal in July 2006, and was originally represented by an attorney. By agreement of the parties the Department conducted a Commissioner's Review of the matter in August 2006. When that did not resolve the matter, the parties entered into further negotiations, which lasted several months. Following the withdrawal of the petitioner's attorney in January 2007, and after further negotiations with the petitioner and her husband, the Department conducted a final review of the matter in April 2007. When this did not resolve all the issues in the matter

to the petitioner's satisfaction, the matter was set for hearing, which was held on July 26, 2007.

At several status conferences¹ and on the record at the hearing the hearing officer carefully advised the petitioner of the Department's burden of proof in the matter and the legal scope of the Human Services Board's review. At the hearing, the petitioner objected to the Department's attempt to introduce evidence of inspections of the petitioner's day care prior to June 2006. The Department's offer of proof in this regard was its anticipation of arguments by the petitioner that she did not have adequate knowledge of the requirements of certain Department regulations. The hearing officer carefully explained to the petitioner that if he sustained this objection, the petitioner would not be able to offer evidence that she did not understand the regulations and argue that citing her for a violation of them was not "fair". The petitioner indicated that she understood that the hearing would thus be limited to whether the violations cited by the Department existed at the facility on the date of the June 2006 inspection, and whether the regulations were sufficiently clear to a reasonable person. The petitioner

specifically elected to continue her objection and to limit the scope of the hearing in this manner.

The hearing concerned four specific alleged violations of the Department's regulations at the June 2006 inspection of the petitioner's day care. The following findings deal with each of them separately.

FINDINGS OF FACT

I.

1. When the Department's licensor made an unannounced visit to the petitioner's day care facility on June 6, 2006 she noted, inter alia, that the plastic mat on top of the table used by the facility to change babies' diapers was cracked and torn. The licensor considered this a serious health violation because germs could be trapped in the absorbent padding in the cracked areas and could not be cleaned adequately.

2. The petitioner admits that there was at least one tear of about an inch in the plastic covering on the changing table. She and her witnesses testified that they placed

¹ Prior to the hearing, scheduled telephone status conferences were held on August 21, 2006 and January 5, February 23, March 19 April 16, May 14, and June 21, 2007.

paper towels under each child whenever diapers were changed on the table.

3. The licensor testified that using absorbent material such as paper towels over a cracked changing surface actually worsened the risk of contact with germs that may have been in the cracks.

II.

4. On June 6, 2006 the licensor also determined that the plastic pail used by the facility for placing soiled diapers did not have a tight fitting cover. The licensor determined that this posed a health risk because airborne germs and odors could escape the container.

5. The petitioner admitted that the container in question had only a swing type lid. A photograph of the container with the lid closed shows a kitchen-type receptacle an air opening with about a half-inch wide running below the lid for several inches along the front of the container.

6. The petitioner and her witnesses testified that the facility's policy is to separately wrap each soiled diaper in a plastic bag before it is placed in the container, so that no odors can escape.

III.

7. The licensor observed two freestanding shelf units in the facility that she felt constituted a tipping and/or falling hazard. One was a boot shelf in the front hall where children placed their boots and shoes when they entered and exited the facility. A photograph shows what appears to be a four-foot wide, three-foot high wooden shelf sitting on the floor against a wall, but not attached or anchored to the wall. It is clear from the picture and the witnesses' descriptions that a child who attempted to climb on the shelf could easily tip it over on top of himself.

8. Another shelf was located in the bathroom of the facility. A photograph and witnesses' descriptions show that this shelf was about a foot wide and six or seven feet high. It sat on the floor against, but not attached to, a wall between a floor post and the diaper changing table. Although it appears to be fairly secure laterally, at least in one direction, it is clear that a child who attempted to climb on it could easily tip it over forward onto himself, and that the contents on the higher shelves could fall on him.

9. The licensor testified credibly that she could easily start to tip both shelves over by placing her hand behind them.

10. The petitioner testified that all the children at her facility are closely monitored by an adult. She also stated that no heavy or sharp objects were ever stored on either shelf. However, it is found that it would have been virtually impossible to insure that no child at the petitioner's facility would ever have been in a position to attempt to climb on the shelves in question.

IV.

11. The licensor also observed violations of Department of Labor and Industry safety standards. In its Commissioner Review letter of August 15, 2006 the Department agreed that it would reduce these violations to an "observation" if and when "documentation is received from you by the Division from the Department of Public Safety documenting such compliance".

12. At the hearing the petitioner produced a letter she had received from the Department of Labor and Industry and sent to the Department purportedly documenting her facility's compliance. The Department did not specifically dispute whether the petitioner's facility is now in compliance, but it represented that it has been unable to verify the contents of the letter because the person who wrote it is on an extended leave of absence.

13. On the basis of the letter it is found that the petitioner's facility, as of the date of the letter, was in compliance with all appropriate regulations of the Department of Labor and Industry.

V.

14. The Department's licensor is well trained and highly experienced. Her judgement as to health and safety risks and hazards appeared reasonable and unbiased.

ORDER

The Department's decisions regarding the diaper changing table, the diaper receptacle, and the two shelves is affirmed. The decision regarding the Department of Labor and Industry violations is reversed.

REASONS

At the outset, it must be noted that this case does not involve a decision by the Department regarding the petitioner's day care license. It is only whether the alleged deficiencies noted in the Department's inspection of the petitioner's facility on June 6, 2006 constituted "violations" of the Department's day care regulations. If so, notices of those violations are listed on the Department's web site for the public's information.

Settlement negotiations in this matter resulted in several other deficiencies noted on June 6, 2006 being reduced to the status of "observations", which are not publicly reported.

I.

Section V.F.4. of the Department's Early Childhood Program Licensing Regulations provides:

There shall be a sturdy, easily cleanable structure, of adequate height with a non-absorbent surface for diaper changing.

Based on the above finding that the table at the petitioner's facility was cracked, exposing absorbent padding material, which was not covered by any other non-absorbent material, it must be concluded that the facility was in violation of the above regulation. The fact that the regulation does not specify that the surface must be free from cracks and tears does not render it vague or misleading to a reasonable day care professional.

II.

Regulation V.F.5. provides:

Staff shall follow a step-by-step diaper changing procedure such as Guidelines for Diapering (See **Appendix C**).

Appendix C of the regulations includes the provision that diaper pails have "a tight fitting lid". It is concluded that the above provisions provide adequate notice

and direction to day care professionals that a kitchen-type receptacle with a slide top lid that leaves significant air space even when closed does not conform to the above provisions.

III.

Regulation V.A.8. provides:

Furniture, equipment and climbing structures shall be clean, sturdy, without sharp edges, and present minimum hazards. Bookcases and other shelving units shall not present a tipping or falling hazard.

As noted above, the licensor's testimony was credible that she could have easily pushed the shelves in question over with her hand. Again, it must be concluded that the above provision reasonably puts a day care professional on notice that shelves that can easily fall forward if pulled from the front or pushed from behind by a child should be anchored to a wall.

IV.

As noted above, the petitioner has presented the Department with a letter from the Department of Labor and Industry that her day care meets that Department's safety regulations. Although the Department states it has not been able to verify the letter due to the unavailability of its author, the petitioner appears to have met the condition set

out by the Department in its Commissioner Review of the matter. Therefore, this deficiency must be reduced to an observation.²

V.

Inasmuch as the Department's decisions regarding items I-III above, are supported by the evidence and constitute reasonable interpretations of its own regulations, they must be affirmed by the Board. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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² The Department is, of course, free to continue its attempt to more-fully verify the petitioner's compliance with Department of Labor and Industry regulations, and to take further action against the petitioner in the future if she is found not to be or to have been in compliance.